

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

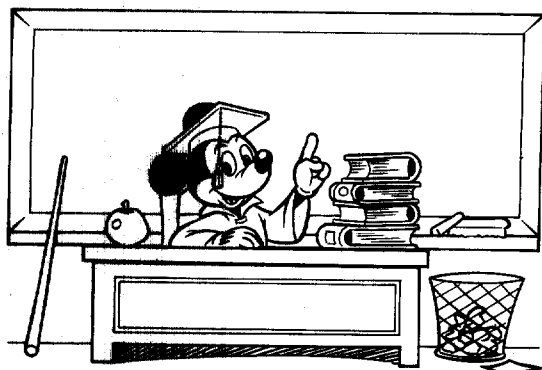
Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

MM Docket No. 93-48

COMMENTS OF

THE **WALT DISNEY** COMPANY.



Diane S. Killory
Susan H. Crandall
MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

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SUMMARY

Bo may know baseball, but The Walt Disney Company knows children. Disney, after all, has been producing movies and television programs for children for more than a half century. The fundamental tenet Disney has learned over the years -- and the tenet that underlies all Disney productions -- is that children will watch quality programs that are entertaining. Children are, in fact, a discerning audience.

The problem that Congress has recently identified, and that the Commission now seeks to address, is *not* that some educational programs also are entertaining. Rather, the problem is that some broadcasters evidently are attempting to avoid their educational programming obligation by designating purely entertainment programs (*e.g.*, *The Flintstones*) as educational.

The Commission, quite properly, now seeks to redress this problem. In doing so, however, it must be careful not to lose sight of the goal of the Children's Television Act of 1990 -- educating children and encouraging them to learn. The Commission's proposal to require that *the primary* purpose of a program be educational, with the entertainment value relegated to secondary status, will unwittingly frustrate that goal. By requiring broadcasters to undertake the difficult task of ranking the educational and entertainment values of programs, the Commission will create an incentive for broadcasters to air programs that are more pedantic and less entertaining. The proposal is thus directly at odds with current educational theory that teaches that children learn best when they are having fun. More significantly, children will not watch -- and consequently will not learn from -- these programs.

In order to ensure that broadcasters meet their educational programming obligation without discouraging programs such as *Sesame Street* that both entertain and educate, the Commission should permit broadcasters to rely on a program if they make a reasonable, good faith judgment that *a significant* (as opposed to *the primary*) purpose of the program is educational. This approach will encourage broadcasters to air programs that are at least as entertaining as they are educational. At the same time, because it would be unreasonable for broadcasters to conclude that a significant purpose of a purely entertainment program like

GI Joe is educational, it will prevent broadcasters from avoiding their educational programming obligation. In short, such an approach will further rather than frustrate Congress' goal in enacting the Act.

Commissioner Duggan recently expressed his hope for "a vigorous, voluntary response from broadcasters and program producers" in providing more educational programming. Disney is a producer that stands ready and willing to produce educational children's programming. All we ask is that the Commission not create a regulatory regime that stifles our ability to do what we do best -- create and produce quality children's programming that will teach children by engaging them in an entertaining manner.

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To: The Commission

**COMMENTS OF
THE WALT DISNEY COMPANY**

The Walt Disney Company ("Disney"), by its attorneys, submits these comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.

INTRODUCTION

In enacting the Children's Television Act of 1990, 47 U.S.C. § 303a and § 303b (the "Act"), Congress required broadcasters to air programs that meet the informational and educational needs of children. Television, Congress stated, is particularly well-suited to help teach children "while entertaining them and exciting their curiosity to learn."¹

Congress thus recognized the fundamental precept upon which today's educational system is based: Children learn best when they are engaged -- *i.e.*, when learning is fun.

¹ 47 U.S.C. § 303a (Supp. II 1990).

What is true in the classroom is equally true on the television screen. Simply put, children will watch programming only if it engages them in an entertaining manner. And they obviously cannot learn from programming they do not watch.

The Commission threatens to frustrate the very purpose of the Act -- educating our children -- by proposing to recognize only those educational programs whose entertainment value is relegated to secondary status. Far from discouraging the entertainment value of this kind of programming, the Commission should be encouraging educational programming that is also entertaining.

The Commission's proposal also risks stifling the creative freedom of broadcasters and producers. Disney is a producer that prides itself on understanding children. Disney's success in producing children's movies and television programs is premised on the same principle that Congress recognized in adopting the Act -- children will watch quality programs that are entertaining, not those that are pedantic and dull.

When Disney entered the first-run children's programming market in 1987, it changed the face of children's entertainment programming. Prior to 1987, there was a dearth of quality children's programming. Children's programs were predominantly based on toys that appealed to either boys or girls (but not both), had unsophisticated story lines, and lacked fully developed characters. Applying its bedrock philosophy to television programming, Disney created a different kind of children's programs -- quality programs that were character/story-based, appealed to both boys and girls, and had well-rounded story lines that featured fully developed characters.

Children reacted positively, with the new Disney programs gaining unprecedented viewership.² Other producers followed Disney's lead, and children's programming soon shifted from toy-based to higher quality, character/story-based programs. Children are, in fact, a discerning audience that will gravitate to quality programs.

The status of the market today with respect to children's educational programming is not unlike the market for children's entertainment programming before 1987. Few resources are devoted to the production of educational programming, which has to date largely been seen as uninteresting and therefore unlikely to attract many viewers. As a result, there is a dearth of quality educational programming currently available.

Disney is convinced, however, that children will watch educational programming if it is high quality and engaging in an entertaining manner. Disney is committed, therefore, to producing television programs that meet the educational and informational needs of children. But we will not compromise Disney's longstanding emphasis on quality programming that will attract children and hold their attention, by entertaining as well as educating them. In short, we will not spend our time and resources to produce programs that children will not watch.³

For these reasons, Disney urges the Commission not to adopt its proposal to require that in order for programming to qualify as educational and informational, its primary purpose must be to educate, with entertainment only a secondary purpose. Instead, so long as a

2 A more detailed discussion of Disney's experience in producing children's television programs can be found in our Comments filed in Docket No. 90-570 (January 30, 1991) ("Disney Comments").

3 The cost of producing quality children's programs is substantial. When Disney entered the children's entertainment programming market in 1987, our programs' budgets were double those of typical children's programs. The educational programs Disney is producing for the 1993 fall season will require Disney to risk many millions of dollars. Taking such a risk will be problematic if we are constrained by a regulatory climate that makes it less likely that children will watch these programs.

broadcaster makes a reasonable, good faith judgment that education is *a significant* (as opposed to *the primary*) goal of a program, the program should be considered educational.

**I. ENTERTAINMENT IS A CRITICAL COMPONENT OF THE
EDUCATIONAL PROCESS**

The goal of the Act is to educate children -- the same goal of our educational system.

The Commission need only consider how educational theory has evolved over the years to realize

Nobel Prize laureate Leon Lederman assists teachers in translating this theory into reality. He founded Teachers Academy for Mathematics and Science, which teaches teachers how to make math and science interesting to students.⁷ The Academy's aim is "the withering away of old-time droning lectures, deadly book lessons and rote memorization."⁸ Lederman, for example, has taught students about conservation of angular momentum by stepping onto a turntable with a brick in each hand and spinning around like a figure skater.⁹

Today's educators combine such innovative teaching methods with a wide array of technology to make learning entertaining and fun, so that children *want* to learn. Virtually every child in America, for example, is introduced at a very early age to computers that engage the child in the learning process through software programs that both entertain and educate.

Entertainment is equally important in educational television programming. The most successful educational programs have been those like *Captain Kangaroo*, *Sesame Street*, and *Romper Room* that children watch primarily because they entertain. The entertainment value of these programs is therefore at least as important as their educational value. Thus, the Commission need only look at educational theory generally, and at successful educational television programming specifically, to see that children learn best when the learning process is entertaining.

⁷ Richard Wolkomir, *Putting A New Spin On Pitching Science To Kids*, Smithsonian, April 1993, at 104.

⁸ *Id.* at 112.

⁹ *Id.* at 104.

**II. THE COMMISSION'S PROPOSAL TO REQUIRE THAT THE
PRIMARY PURPOSE OF PROGRAMMING BE EDUCATIONAL,
WITH ANY ENTERTAINMENT VALUE PURELY SECONDARY,
WILL DISSERVE THE PUBLIC INTEREST**

Given how critical entertainment is to the educational process, the Commission's proposal to require that any entertainment value of educational programming be purely secondary will disserve the public interest. The Commission's proposal puts broadcasters to the almost impossible task of ranking the educational and entertainment purposes of a program. The Commission thus will create such a degree of uncertainty (at least with respect to programs that both educate and entertain) that broadcasters will have a strong incentive to air redundant and dull albeit primarily educational programs to ensure that they have met their

Commission would better serve the public interest by encouraging programming that is at least as entertaining as it is educational.

A. The Commission's Proposal Will Frustrate The Purpose Of The Act By Unwittingly Encouraging Broadcasters To Air Programs That Children Will Not Watch

In its Notice of Inquiry, the Commission states that "it seems clear that Congress intended, in adopting the [Act], to increase the amount of educational and informational programming aimed expressly at the child audience."¹⁰ To be sure, the legislative history of the Act confirms the accuracy of the Commission's statement. That statement, however, tells only part of the story. Congress intended not only to increase the amount of educational programming on television, but also for children to watch and learn from that programming.¹¹

Congress understood that programs can be both educational and entertaining. Noting that "the questions most asked concerning educational programming are whether children will watch," Congress approvingly cited programs like *Sesame Street*, *Fat Albert and the Cosby Kids*, and *Winnie the Pooh and Friends*.¹² All these programs both educate and entertain; and it takes both attributes to further the Act's goal.

The problem recently identified by Congress is not that some programs are designed

(e.g., *The Flintstones*) as educational programs. The Commission, in ensuring that broadcasters meet their educational programming obligation under the Act, must be careful not to discourage the very type of programming lauded by Congress -- entertaining educational programming.

Disney respectfully submits that the Commission's proposal will, in fact, discourage this type of programming. The Commission proposes to require broadcasters to determine whether *the primary* purpose of a program is educational. The program's entertainment value, under the Commission's proposal, can only be *implicit*. Broadcasters will thus have to decide -- usually with respect to programs others have produced -- whether those programs are designed to teach more than they are designed to entertain. This will, however, be a difficult distinction for broadcasters to draw -- particularly for programs that are designed to capture children's attention in an entertaining manner.¹³

Consider, for example, the award-winning and ever-popular *Sesame Street*. The

If broadcasters are uncertain whether the Commission will agree that the entertainment value of a program like *Sesame Street* is clearly secondary to its educational

requirements of the Act under the Commission's proposal, the Commission will have frustrated the Act's goal.

**B. The Commission Can Further The Act's Purpose By
Encouraging Programming That Is At Least As
Entertaining As It Is Educational**

The Commission should encourage rather than discourage broadcasters to air

III. THE COMMISSION SHOULD DEFER TO A BROADCASTER'S REASONABLE, GOOD FAITH JUDGMENT THAT A SIGNIFICANT PURPOSE OF A PROGRAM IS EDUCATIONAL

Disney strongly urges the Commission not to adopt its proposal to require that *the primary* purpose of qualifying programming be educational. Rather, the Commission should allow a program to qualify so long as a broadcaster makes a reasonable, good faith judgment that *a significant* purpose of the program is to educate -- *i.e.*, to further "the child's intellectual/cognitive or social/emotional needs."¹⁹ Similarly, the Commission should not require that entertainment only be an implicit purpose of educational programming. To the contrary, as explained above, the Act's goal would be better served if educational programming is explicitly designed to be entertaining.

Deferring to a broadcaster's reasonable, good faith judgment that *a significant* purpose of a program is educational will relieve broadcasters of the difficult task of discerning whether the entertainment value of a clearly educational program is less than, rather than equal to, the educational value, as well as whether it is implicit rather than explicit. Broadcasters will then feel more comfortable airing programs that are both educational and entertaining.

Applying this standard, and deferring to the broadcaster's reasonable, good faith judgment, will also preserve for broadcasters the discretion that Congress intended they have with respect to identifying and airing informational and educational programming.²⁰ The

19 47 C.F.R. § 73.520 Note (1992). The Commission has relied on the reasonable, good faith judgment of licensees in other contexts. For example, licensees are allowed to exercise their reasonable, good faith judgment in selecting which issues of importance to their community to address in their programming. Revision of Programming and Commercialization Policies, Report and Order, MM Docket No. 83-670, 98 F.C.C.2d 1076, 1092 (1984), *aff'd in pertinent part*, 821 F.2d 741 (D.C. Cir. 1987).

20 See, e.g., Senate Report at 23.

broadcaster, is, after all, in the best position to decide what to air to meet the educational and informational needs of the children in the broadcaster's community based on its assessment of those needs.²¹ This approach also will permit the Commission to avoid unduly enmeshing itself in content regulation.²² When it first adopted regulations pursuant to the Act, the Commission was mindful of the First Amendment considerations, noting that it "wish[ed] to avoid any de facto system of 'precensorship.'"²³ The Commission carefully adopted a "restrained [approach],"²⁴ providing broadcasters with "substantial discretion . . . in determining whether a particular program qualifies as educational and informational"²⁵ The Commission must be careful not to create the very "de facto system of precensorship" it properly sought to avoid.

21 This does not mean that broadcasters could designate any program as educational. For example, reasonable people would not conclude that education is a significant purpose of *The Flintstones*.

22 Just as the Commission does not regulate a broadcaster's programming format generally, so too it should not regulate the format of educational programs. Thus, a program's value as educational or informational programming should not depend on its status as live-action rather than animation. A program like *All Star Cartoons to the Rescue*, for example, is a clear example of an animated program with a significant educational purpose. In that unprecedented special, cartoon characters from a number of studios (e.g., Winnie the Pooh, Huey, Dewey and Louie, Bugs Bunny, and Daffy Duck) were featured in a story line in which they helped a boy discover the error of his ways in using drugs. Indeed, many of the programs cited by Congress use animation to deliver their educational and informational messages. See Senate Report at 8-9.

23 Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rulemaking, MM Docket No. 90-570, 5 FCC Rcd. 7199, 7200 (1990).

24 Report and Order at 2118.

25 Notice of Inquiry at 1841. A broadcaster should be permitted to rely on the examples of educational programs previously cited by the Commission. If, therefore, the Commission should decide that some of those programs will no longer qualify as educational programming, it must give notice of this fact to broadcasters and apply its decision only prospectively.

CONCLUSION

Commissioner Duggan has called for "*voluntary* leadership by . . . industry leaders" in the important arena of educational children's television.²⁶ Disney accepts the challenge and stands ready to produce educational children's programming. All we ask is that the Commission not create a regulatory regime that stifles our ability to produce quality educational programs that will attract and hold children's attention, by engaging them in an entertaining manner.

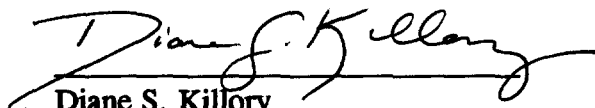
Specifically, Disney asks the Commission to reconsider its proposal to require that *the primary* purpose of a program be educational to satisfy a broadcaster's obligation to air educational programming. The Commission would better serve the Act's goal by encouraging programming that is as entertaining as it is educational. So long as a broadcaster makes a

²⁶ *Children's Television: Who Will Volunteer?*, Broadcasting and Cable, March 15, 1993, at 50 (emphasis in original).

reasonable, good faith determination that *a significant* purpose of a program is educational, the broadcaster should be permitted to rely on that program as an educational program.

Respectfully submitted,

THE WALT DISNEY COMPANY



Diane S. Killory

Susan H. Crandall

MORRISON & FOERSTER

2000 Pennsylvania Avenue, N.W.

Suite 5500

Washington, D.C. 20006

(202) 887-1500

Its Attorneys

May 7, 1993